

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-02-DL-191
Access.1 Communications Corp.-NY)	
)	NAL/Acct. No. 200232500009
Owner of Antenna Supporting Structure)	
No. 1051379)	FRN: 0006-1618-55
)	
New York, New York)	

FORFEITURE ORDER

Adopted: October 28, 2003

Released: October 30, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of two thousand dollars (\$2,000) to Access.1 Communications Corp.-NY ("Access.1"), owner of Antenna Supporting Structure No. 1051379 ("KCUL-FM Tower"), for willful violation of Section 17.50 of the Commission's Rules ("Rules").¹ The noted violation involves Access.1's failure to clean or repaint its antenna structure as often as necessary to maintain good visibility.

2. On September 30, 2002, the District Director of the Commission's Dallas, Texas Field Office ("Dallas Office") issued a *Notice of Apparent Liability for Forfeiture* ("NAL") to Access.1 in the amount of ten thousand dollars (\$10,000).² Access.1 filed a response to the NAL on October 30, 2002.

II. BACKGROUND

3. On July 24, 2000, Access.1 notified the Commission that it consummated the purchase of radio stations KCUL(AM) and KCUL-FM, Marshall, Texas, on July 21, 2000. In the purchase, Access.1 acquired the KCUL-FM Tower located at 32° 32' 26"N / 094° 24' 4"W in Marshall. Both the Rules and Federal Aviation Administration specifications require that the KCUL-FM Tower be painted.

4. On April 17, 2002, an agent from the Dallas Office inspected the KCUL-FM Tower and determined that the structure's required obstruction marking appeared to be deteriorating, making it difficult to distinguish the orange and white bands.

¹ 47 C.F.R. § 17.50.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232500009 (Enf. Bur., Dallas Office released September 30, 2002).

5. On May 5, 2002, the agent returned to the KCUL-FM Tower and concluded that the required paint bands could not be distinguished at approximately one fourth of a mile, resulting in poor visibility of the structure in violation of Section 17.50 of the Rules.

6. On September 30, 2002, the Dallas Office issued a *NAL* to Access.1 in the amount of ten thousand dollars (\$10,000) for willful violation of Section 17.50 of the Rules. Access.1 filed a response on October 30, 2002, seeking reduction or cancellation of the proposed forfeiture. Declarations, signed under penalty of perjury, from Cary Camp, the General Manager of KCUL(AM) and KCUL-FM, and Jerry Wimberly, President of Mid South Antenna Specialists, accompanied the response.

7. In response to the *NAL*, Access.1 argues that the proposed forfeiture should be canceled because the KCUL-FM Tower complied with Section 17.50 of the Rules. Mr. Camp explains that he has been employed in the broadcast industry for over 18 years, 12 of those as owner and general manager of eight radio stations. Mr. Camp states that, during his years in the industry, he supervised the maintenance and scheduled the painting of numerous broadcast towers and that he believed the KCUL-FM Tower complied with Section 17.50 of the Rules.

8. Mr. Camp notes that in October 2001 he budgeted to have the KCUL-FM Tower repainted in mid-2002. Mr. Camp states that he chose this timetable, because, based on his personal inspection and experience, the paint on the tower had not deteriorated to a point where it currently violated Section 17.50 of the Rules.

9. In early 2002, Mr. Camp contacted Mr. Wimberly to schedule repainting of the KCUL-FM Tower around June of 2002. Mr. Wimberly states in his declaration, that he has painted and supervised the painting of broadcast towers for 24 years, and that during that time he has painted or repainted approximately 200 towers. Mr. Wimberly further states that he is familiar with the Commission's tower painting rule, and believes he can tell when a tower is not in compliance. Mr. Wimberly asserts that when Mr. Camp first contacted him, in early 2002, he examined the KCUL-FM Tower and determined that it complied with the Commission's painting requirements. He states that he agreed with Mr. Camp that June of 2002 would be an appropriate time to repaint the tower.

10. Mr. Wimberly repainted the KCUL-FM Tower on June 15, 2002. Mr. Wimberly declares that even on this date, which was more than one month after the agent's May 5, 2002 inspection, he believed the KCUL-FM Tower complied with the Commission's painting requirements.

11. Access.1 next argues that even if the KCUL-FM Tower did not comply with Section 17.50 of the Rules, the proposed forfeiture should still be canceled or reduced because Access.1 acted in good faith to comply with the Commission's Rules. In his declaration, Mr. Camp states that Access.1 painted the KCUL-FM Tower on June 15, 2002, as part of regularly scheduled maintenance, without any knowledge of the agent's inspections, and prior to the issuance of the *NAL*.

12. In a similar vein, Access.1 asserts that the forfeiture should be canceled or reduced because Access.1's conduct is "precisely that which the Commission has always sought to obtain--compliance with the Commission's rules in the ordinary course of business, in the exercise of the licensee's own good faith judgment, and without Commission intervention."³

³ Access.1's response to the *NAL* at p. 7, citing the 1998 *Biennial Regulatory Review--Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules*, 13 FCC Rcd 23056 at para. 23 (1998) ("*Biennial Regulatory Review*").

13. Access.1 further argues that the forfeiture amount should be canceled or reduced because the Commission issued the *NAL* without first contacting Access.1 and directing it to remedy the violation within a certain period of time. Access.1 states that prior to the issuance of an *NAL*, the Commission “usually” informs a licensee that an inspection is being conducted, advises the licensee of any failure to comply with the Rules, and gives the licensee a set time to comply with the Rules. Access.1 concludes that assessing a \$10,000 forfeiture, without the aforementioned process, is arbitrary, capricious, and an abuse of discretion.

14. Finally, Access.1 argues that the proposed forfeiture should be reduced based on its history of overall compliance.

III. DISCUSSION

15. The District Director assessed the proposed forfeiture amount in this case in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),⁴ Section 1.80 of the Rules,⁵ and *The Commission’s Forfeiture Policy Statement and Amendments of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* (“*Forfeiture Policy Statement*”).⁶ In examining Access.1’s response to the *NAL*, Section 503(b) of the Act requires the Commission to take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁷

16. First, we disagree with Access.1 that the KCUL-FM Tower complied with Section 17.50 of the Rules. Section 17.50 of the Rules provides that antenna structures requiring painting shall be cleaned or repainted as often as necessary to maintain good visibility. Based on the field agent’s observations, that the tower’s painted bands could not be distinguished at approximately one fourth of a mile, we determine that the KCUL-FM Tower did not comply with the requirements of Section 17.50 of the Rules. We find nothing in Access.1’s response that warrants overturning the agent’s determination.⁸

17. Furthermore, we find that Access.1 willfully violated Section 17.50 of the Rules. The term “willful” as used in Section 503(b) of the Act, does not require a finding that the rule violation was intentional or that the violator was aware that it was committing a rule violation.⁹ The term “willful” simply requires that the violator knew it was taking the action in question, irrespective of any intent to

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ See *William L. Needham and Lucille Needham*, 18 FCC Rcd 5521 (Enf. Bur. 2002) (upholding the field agent’s determination that the tower’s painted bands were not clearly visible, despite tower owner’s assertion that it had no difficulty discerning the painted bands and maintained a painting schedule for the tower).

⁹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful,’ ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

violate the Rules.¹⁰ We conclude that Access.1 willfully violated Section 17.50 of the Rules because Access.1 made a conscious and deliberate decision not to repaint the KCUL-FM Tower until June 15, 2002.¹¹

18. Access.1 points to the painting schedule, established by Mr. Camp in October 2001, and the actual painting of the KCUL-FM Tower, prior to any notice of the inspections or issuance of the *NAL*, as evidence of Access.1's good faith efforts to comply with the Rules. Access.1 argues that these efforts warrant canceling or reducing the proposed forfeiture. In light of our finding that Access.1 willfully violated Section 17.50 of the Rules, we disagree that the forfeiture should be canceled. However, we agree with Access.1 that identifying the need to repaint the tower, scheduling the tower for repainting, and repainting the KCUL-FM Tower prior to any notice of the inspections or issuance of the *NAL* merits a reduction of the proposed forfeiture. We therefore reduce the forfeiture amount from ten thousand dollars (\$10,000) to four thousand dollars (\$4,000) based on Access.1's good faith efforts to comply with Section 17.50 prior to being informed of the violation.¹²

19. Access.1 also argues that the forfeiture should be canceled or reduced because its conduct is precisely what the Commission seeks to obtain.¹³ However, the Commission has consistently stressed that it expects full compliance with the antenna structure rules because of the potential danger to air navigation;¹⁴ in light of our determination that Access.1 violated Section 17.50 of the Rules we do not further reduce the forfeiture amount based on this argument.

20. Turning to Access.1's argument that the proposed forfeiture should be reduced based on its history of overall compliance, we agree and further reduce the forfeiture from four thousand dollars (\$4,000) to two thousand dollars (\$2,000).

21. We disagree with Access.1's final argument that the *NAL* should be reduced or canceled because Access.1 did not receive notice of the inspection prior to the issuance of the *NAL*.¹⁵ In advancing this argument, Access.1 first asserts that the Commission usually directs licensees to remedy violations within a set time period prior to issuing a *NAL*.¹⁶ Access.1 concludes that enforcing this *NAL* without the

¹⁰ *Southern California Broadcasting Co.* 6 FCC Rcd at 4388.

¹¹ See *Needham*, 18 FCC Rcd at 5522 (concluding that the tower owner acted willfully in failing to repaint a tower when the tower owner was aware of the condition of the paint, but chose not to repaint the tower).

¹² See *Radio One Licenses, Inc.*, 18 FCC Rcd 15964 (2003).

¹³ Access.1 cites the *Biennial Regulatory Review* at paragraph 23 as evidence of the type of conduct the Commission expects from its licensees. We disagree with Access.1 that the *Biennial Regulatory Review* is relevant to determining whether a licensee complied with Section 17.50 of the Rules. Paragraph 23 of the *Biennial Regulatory Review* explains why the Commission recast certain Mass Media Bureau forms into "yes" or "no" certification formats, with an "explanation" checkbox.

¹⁴ See *SpectraSite Communications Inc.*, 17 FCC Rcd. 7884 (2002).

¹⁵ Neither 47 U.S.C. § 503(b) nor 47 C.F.R. §§ 1.80 and 1.89 require the Commission to issue a Notice of Violation prior to the issuance of a *NAL*.

¹⁶ The fact that Access.1 cited five cases where the Commission gave notice prior to issuing a *NAL* does not establish that the Commission is obligated to give such notice.

“usual” prior notice would be arbitrary, capricious, and an abuse of discretion. We disagree and note that neither the Commission nor its agents are obligated to notify a licensee when an inspection occurs or provide a licensee an opportunity to cure a violation prior to issuing an NAL.¹⁷

22. In summary, we find that Access.1 willfully violated Section 17.50 of the Rules by failing to clean or repaint the KCUL-FM Tower as often as necessary to maintain good visibility. However, based on Access.1’s good faith efforts and history of overall compliance we reduce the forfeiture amount from ten thousand dollars (\$10,000) to two thousand dollars (\$2,000).

IV. ORDERING CLAUSES

23. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311, and 1.80(f)(4) of the Rules,¹⁸ Access.1 Communications Corp.-NY **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of two thousand dollars (\$2,000) for willfully violating Section 17.50 of the Rules.

24. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁹ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (“FRN”) referenced above, and should also note the NAL/Acct. No. referenced above. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁰

25. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by first class and certified mail, return receipt requested, to Access.1 Communications Corp., 505 Eight Avenue, Ninth Floor, New York, New York 10018, and its counsel, James L. Winston, Esq., Rubin, Winston, Diercks, Harris & Cooke, L.L.P., 1155 Connecticut Avenue, N.W. Washington D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁷ See *AT&T Wireless Services Inc.*, 17 FCC Rcd 21866, 21871 n. 20 (2002) (enforcing a forfeiture issued without a Notice of Violation). See also *Missouri RSA*, 18 FCC Rcd 12653, 12654 (Enf. Bur. 2003) (“Nothing in the Communications Act or the Commission’s Rules entitles a licensee to an opportunity to correct a violation prior to the issuance of a NAL. Licensees cannot expect simply to sit back and await Commission findings of violations before taking appropriate steps to ensure compliance with Commission rules.”).

¹⁸ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁹ 47 U.S.C. § 504(a).

²⁰ 47 C.F.R. § 1.1914.